



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

April 11, 2003

Ms. Joanne Wright
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2003-2456

Dear Ms. Wright:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179325.

The Texas Department of Transportation ("TxDOT") received a request for the entire CTS, CIS, CBS and SiteManager tables. You claim that the requested information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978).

You state that TxDOT relies on construction and maintenance contracts with private contractors to build and maintain the roads of Texas. You inform us that "new bids are always being sought and new contracts are always being signed." You state that the contractors who bid on these contracts repeatedly compete with each other as bids are sought. You indicate that "to maximize efficiency and save time and money, TxDOT has instituted a 'pre-qualification' procedure that requires contractors to submit certain financial information in advance of any bid." You assert that the release of the information would impair TxDOT's "ability to compete for contractors with entities that do not have to release private financial information" and would, in effect, reduce competition on competitive bids. Finally, you inform us that if the financial information is released to competitors, it would give those competitors "a significant and unfair advantage" in that those competitors could use the financial information to effectively destroy competition. Upon careful review of your arguments and the submitted information, we believe that TxDOT has demonstrated that public release of the financial information at issue would cause specific harm to TxDOT's interests in particular competitive bidding situations. Accordingly, we believe TxDOT has adequately demonstrated the applicability of section 552.104 to the submitted financial information. Therefore, TxDOT may withhold the submitted financial information from required public disclosure under section 552.104. We note, however, that not all of the information you have marked under section 552.104 is financial information. Therefore, we have marked the financial information that may be withheld under section 552.104.

You also argue that portions of the submitted information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a)-(b). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See* Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

You state that you have provided each of the affected contractors with a copy of this letter "so that it may add its own perspective, if it wishes." *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory

predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, no company has submitted to this office its reasons explaining why its information should not be released. Therefore, no third party has provided us with a basis to conclude that they have a protected proprietary interest in any of the submitted information. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, we will determine if TxDOT has demonstrated that the submitted information may be withheld under section 552.110 of the Government Code.

You assert that release of this information would impair TxDOT's ability to obtain similar information in the future, "as companies will be understandably reluctant to publicize their private financial data." You also state that "release of a contractor's private financial information will harm the competitive positions of the contractor, to the detriment of both the contractor and of TxDOT's interest in a competitive marketplace." We note that the impact on a governmental body of the release of information obtained from a private party is not a relevant consideration under section 552.110(b). The former section 552.110 excepted "commercial and financial information . . . privileged or confidential by statute or judicial decision." In 1996, this office announced it would follow the test for applying section 552(b)(4) of the federal Freedom of Information Act as set forth in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test was whether disclosure of the requested commercial or financial information is likely either to: (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. However, the Third Court of Appeals held that *National Parks* was not a judicial decision within the meaning of the former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110 as amended now expressly includes the standard for excepting from disclosure commercial and financial information. That standard includes the part of the *National Parks* test that states commercial or financial information is confidential if disclosure is likely to cause substantial harm to the competitive position of the person from whom the information was obtained, but does not incorporate the part of the *National Parks* test that requires that disclosure of the information be likely to impair the government's ability to obtain necessary information in the future. Like the federal standard, the amended section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would

likely result from disclosure. Having considered your arguments and reviewed the submitted information, we conclude that you have not made the required specific factual showing that the release of any information obtained from a private party would result in substantial competitive injury to that party. Therefore, TxDOT may not withhold any of the submitted information under section 552.110(b).

To summarize, we conclude that TxDOT may withhold the information we have marked under section 552.104 of the Government Code. The remaining submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sarah Swanson".

Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 179325

Enc. Submitted documents

c: Brian Collister
The Troubleshooters
P. O. Box 2641
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(w/o enclosures)